

SERVICE DATE – MARCH 3, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35874

LONE STAR RAILROAD, INC. AND SOUTHERN SWITCHING COMPANY—TRACK
CONSTRUCTION AND OPERATION EXEMPTION—IN HOWARD COUNTY, TEX.

Digest:¹ This decision grants in part the petition for exemption filed by Lone Star Railroad, Inc., and Southern Switching Company to construct and operate a new line of railroad. The Board is authorizing Lone Star Railroad, Inc., to build and operate a new line of railroad in Howard County, Tex., subject to environmental mitigation conditions. The Board is denying the petition for exemption with respect to Southern Switching Company's proposed operation of the newly constructed line because the record does not support the authority requested.

Decided: February 26, 2016

By petition filed on February 25, 2015, Lone Star Railroad, Inc. (LSR), a Class III carrier, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct a new line of railroad in Howard County, Tex. (the Line). The Line would be approximately 3.18 miles and be used to provide rail service to an industrial park near Big Spring, Tex.,² via a connection with an existing Union Pacific Railroad Company (UP) mainline that extends between Dallas and El Paso, Tex. In the same petition, Southern Switching Company (SSC), a Class III carrier, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10902 to operate the Line. (LSR and SSC are collectively referred to as Petitioners.)

By decision served on May 14, 2015, the Board instituted a proceeding under 49 U.S.C. § 10502(b) and initiated an environmental review. The Board's Office of Environmental Analysis (OEA) has now completed a thorough Environmental Assessment (EA) analyzing the potential environmental impacts of the proposal, as required by the National Environmental

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Petitioners submitted a map of the proposed track with its petition (Appendix MC-1). Depending on various land acquisition and operational factors, Petitioners would construct Tracks A, B, A-1, and B-1 totaling approximately 3.18 miles, or only Tracks A and B, totaling 2.14 miles. (Pet., App. 1, V.S. Cundiff 2; Draft EA ES-1 to ES-2.)

Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f). Based on that analysis, OEA has recommended environmental conditions to avoid, minimize, or mitigate the potential environmental impacts of the proposed construction and operation.

After considering both the rail transportation and the environmental issues, we are granting the petition for exemption with respect to LSR's proposed construction of, and operations over, the Line, subject to OEA's final recommended environmental mitigation measures. However, the Board is denying without prejudice the petition for exemption with respect to SSC's proposed operation of the Line because the record does not support the authority requested.

BACKGROUND

Petitioners propose that LSR would construct the Line and that SSC would be the operator.³ SSC is an affiliated Class III carrier that currently operates over rail lines owned by LSR and over rail lines leased from UP. Petitioners acknowledge that LSR would have a residual common carrier obligation to operate the Line, or obtain a replacement operator if SSC were to discontinue rail service over the Line.

Petitioners state that the purpose of the proposed rail line is the efficient delivery of frac sand to the industrial park, where it would be transloaded to trucks and delivered to crude oil wellheads in the Permian Basin near Midland and Odessa, Tex. According to Petitioners, the production of crude oil requires large quantities of frac sand, which is mined primarily in Wisconsin and Minnesota and transported to West Texas by rail. Petitioners state that the proposed rail line would allow for the efficient transloading of frac sand from rail to truck at an uncongested location for staging and delivery to the wellheads located west and south of Big Spring.⁴ The proposed rail line would eventually support an average of five trains per week (including both inbound and outbound trains) consisting of up to 100 hopper cars of frac sand per train. (Pet. 4-5, App. 1, V.S. Cundiff 2-3; Draft EA ES-1.)

DISCUSSION AND CONCLUSIONS

Rail Transportation Analysis. The construction and operation of new railroad lines requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. Section 10901(c) directs the Board to grant rail construction

³ LSR is a wholly-owned subsidiary of CGX, Inc. (CGX). SSC is a wholly-owned subsidiary of Ironhouse Resources, Inc., which is a wholly-owned subsidiary of CGX. Ironhorse and CGX are holding companies.

⁴ The Line could also be used to ship and receive other supplies associated with shale oil production, such as line pipe, drill pipe, casing pipe, and aggregate. (Pet., App. 1, V.S. Cundiff 3.)

proposals unless it finds the proposal “inconsistent with the public convenience and necessity.” Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. See Alaska R.R.—Constr. & Operation Exemption—Rail Line Extension to Port MacKenzie, Alaska, FD 35095 (STB served Nov. 21, 2011), aff’d sub nom. Alaska Survival v. STB, 705 F.3d 1073 (9th Cir. 2013).

Likewise, under 49 U.S.C. § 10902, the acquisition or operation of a rail line by a Class II or III carrier requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10902 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10902.

Under § 10502(a), the Board must exempt a transaction or service from regulation when it finds that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) regulation is not necessary to protect shippers from an abuse of market power.

Based on the record before us, we conclude that the proposed construction and operation of the Line by LSR qualifies for an exemption under § 10502 from the formal application procedures of § 10901.⁵ Detailed scrutiny of the proposal under 49 U.S.C. § 10901 is not necessary in this case to carry out the rail transportation policy. An exemption would minimize unnecessary expense associated with the preparation and filing of a formal construction application, expedite regulatory decisions, and reduce regulatory barriers to entry for the Line, whose purpose is to permit more efficient transportation and delivery of frac sand and other supplies associated with shale oil production. 49 U.S.C. §§ 10101(2), (7), (15). The proposed construction and operation exemption also would promote the rail transportation policy by allowing competition and demand for services to establish reasonable rail rates; minimizing the need for Federal regulatory control over the creation of a rail line that will make the transportation system more efficient; and ensuring the continuation of a sound rail transportation system to meet the needs of the public, consistent with the goals of 49 U.S.C. §§ 10101(1), (2), (4), and (7). Other aspects of the rail transportation policy would not be adversely affected.

In addition, consideration of the proposed rail line under § 10901 is not necessary to protect shippers from an abuse of market power. The construction and operation of the proposed Line by LSR would enhance competition by providing rail service where it does not currently exist, and allowing for efficient transloading of high-volume rail traffic into trucks for final delivery.⁶

⁵ As Petitioners acknowledge, upon construction of the Line, LSR will have a common carrier obligation to operate the Line. (Pet. 4, 6.)

⁶ Given our finding regarding the lack of need for shipper protection under § 10502(a)(2)(B), we need not determine whether the transaction is limited in scope under 49 U.S.C. § 10502(a)(2)(A).

For these reasons, we conclude that the evidence on the transportation-related aspects of this case demonstrates that the proposed construction and operation of the Line by LSR qualifies for our exemption procedures. Given the statutory presumption favoring rail construction and the evidence presented, the requested exemption from § 10901 has met the standards of § 10502.

Petitioners' filings here, however, do not support an exemption under § 10502 from the formal application procedures of § 10902 for SSC's operation of the Line. While the petition notes that SSC is seeking an exemption from the requirements of § 10902 to operate the Line (Pet. 2, 9), the petition fails to explain why SSC's operation of the Line would qualify for an exemption from § 10902 under 49 U.S.C. § 10502. Therefore, the Board is denying the petition for exemption insofar as it relates to SSC's operation of the Line, without prejudice to SSC's submitting either a properly supported petition for exemption or a verified notice of exemption pursuant to 49 C.F.R. § 1150.41.⁷

Environmental Analysis. In reaching our decision, we have also considered the environmental impacts associated with the proposed Line. NEPA requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public concerning those effects. See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction project as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). While NEPA prescribes the process that must be followed, it does not mandate a particular result. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, the agency may conclude that other values outweigh the environmental costs. Id.

There has been a thorough NEPA review in this case. On October 16, 2015, OEA issued a Draft EA addressing the potential impacts of the proposed construction and operation, and the No-Action Alternative for public review and comment.⁸ In the Draft EA, OEA preliminarily recommended 10 mitigation measures to address the potential environmental impacts of the proposed project on geology and soils, water resources, air quality, vegetation, wildlife, threatened and endangered species, and cultural resources.

⁷ Because the EA in this case addressed the proposed operations, as well as rail construction, there would be no need for additional environmental review.

⁸ OEA determined that, because of the limits of the industrial park space, no alternative configurations within the industrial park property would allow efficient delivery of frac sand by rail. OEA also concluded that alternatives outside the industrial park property would not reasonably and feasibly meet the purpose and need for the project. Therefore, OEA considered only Petitioners' proposal and the No-Action Alternative. (Draft EA ES-3.)

The 30-day comment period ended on November 16, 2015. Comments were received from the Texas Parks and Wildlife Department (TPWD) and the U.S. Environmental Protection Agency (EPA).⁹ On December 18, 2015, OEA issued a Final EA responding to the comments received on the Draft EA. OEA explained that the Draft EA had addressed TPWD's concerns related to the need to assess biological resources including vegetation, wildlife, and threatened and endangered species in the EA. In response to EPA's comment, OEA added new mitigation measures MM-6 and MM-7 to minimize fugitive dust emissions, and MM-8 and MM-9 to limit air emissions from rail line construction equipment. In response to EPA's recommendation for a more detailed hazardous waste and spill prevention plan, OEA explained that the final hazardous waste and spill prevention plan mitigation in the Final EA (MM-10) specifically requires that the plan address the release of hazardous materials, reporting and notification procedures, fuel storage, and transfer practices to prevent spills and leaks.¹⁰ Lastly, in response to EPA's concerns related to the discussion of cultural resources and socio-economics in the Draft EA, OEA explained that it engaged in Government-to-Government consultation with Native American tribes during the environmental review process and that the Draft EA appropriately analyzed the potential impacts of the project on low-income and minority populations. (Final EA 2-1 to 2-4.)

Additionally, Petitioners offered two voluntary mitigation measures regarding transportation and safety and noise and vibration (VM-1 and VM-2), which OEA recommends that the Board adopt. In the Final EA, OEA concludes that there is no need to prepare a full Environmental Impact Statement in this case because the proposed transaction would not result in significant environmental impacts if the Board imposes, and Petitioners implement, the final mitigation measures recommended by OEA.

We have reviewed the environmental record, and we are satisfied that OEA has taken the requisite "hard look" at the potential environmental impacts associated with the proposed construction and operation of the Line. The EA adequately identifies and assesses the environmental impacts discovered during the course of the environmental review and includes appropriate environmental mitigation to avoid or minimize potential environmental impacts. We agree with OEA's analysis and adopt the final recommended mitigation measures. See Appendix A (voluntary mitigation measures), Appendix B (OEA mitigation measures).

⁹ The National Park Service filed a letter stating that it had no comments on the Draft EA.

¹⁰ OEA also amended mitigation measure MM-3 to clarify that the mitigation measure does not require compliance with federal, state, and local requirements that would unreasonably interfere with interstate commerce. Mitigation measure MM-13 was also revised to specifically require that the parties report to OEA on the results of any consultations with the State Historic Preservation Officer related to any rail line construction activities that take place outside the rail line right-of-way but in the vicinity of certain historic/prehistoric sites.

CONCLUSION

After considering the various rail transportation and environmental issues and the record as a whole, we authorize LSR to construct and operate the Line, subject to compliance with the environmental mitigation measures listed in the appendices to this decision. Although the No-Action Alternative would avoid any potential environmental impacts (as the Board would not license the construction and operation of the proposed rail line), the transportation benefits of the project would not be realized. We also deny the petition for exemption with respect to SSC's proposed operation of the Line. That denial is without prejudice to SSC's submitting either a properly supported petition for exemption from § 10902 or a verified notice of exemption pursuant to 49 C.F.R. § 1150.41.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board grants the petition for exemption under 49 U.S.C. § 10502 with respect to LSR's proposed construction and operation of the above-described rail line under 49 U.S.C. § 10901.
2. The Board denies without prejudice the petition for exemption under 49 U.S.C. § 10502 with respect to SSC's operation of the Line under 49 U.S.C. § 10902.
3. The Board adopts the environmental mitigation measures set forth in Appendix A and Appendix B to this decision and imposes them as conditions to the exemption granted here.
4. Notice will be published in the Federal Register on March 3, 2016.
5. Petitions to reconsider or to reopen must be filed by March 23, 2016.
6. This decision is effective on April 2, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

APPENDIX A

VOLUNTARY MITIGATION MEASURES

Transportation and Safety

VM-1. The Petitioner shall consult with Howard County, Tex., regarding curb cut and road planning in the vicinity of the proposed rail line construction.

Noise and Vibration

VM-2. The Petitioner shall use industry best practices in order to minimize noise in the residential area to the south of the proposed track construction.

APPENDIX B

THE BOARD'S MITIGATION MEASURES

Physical Resources – Geology and Soils, Water Resources, and Air Quality

MM-1. The Petitioner shall use water trucks as appropriate during rail line construction activities in order to minimize fugitive dust emissions and shall employ best management practices in the control and suppression of fugitive dust emissions.

MM-2. The Petitioner shall limit rail line construction activities, vegetation clearing, and soil disturbance to the rail line right-of-way in order to minimize fugitive dust generation.

MM-3. The Petitioner shall comply with the requirements of applicable federal, state, and local regulations regarding the control of fugitive dust related to rail line construction activities that do not unreasonably interfere with interstate commerce.

MM-4. Should federal funds be used by the Petitioner in the construction of the rail line, the Petitioner shall consult with the U.S. Department of Agriculture, Natural Resources Conservation Service regarding the requirements of the Farmland Protection Policy Act.

MM-5. The Petitioner shall implement soil erosion and sedimentation control measures to minimize impacts on surface waters in the project area from stormwater runoff during rail line construction activities.

MM-6. In order to minimize fugitive dust emissions related to rail line construction activities, the Petitioner shall implement the best management practices listed below during rail line construction.

- Stabilize heavily used, unpaved construction roads with a non-toxic soil stabilizer or soil weighting agent that will not result in loss of vegetation or increase other environmental impacts.
- Limit vehicle speeds to 25 miles per hour on stabilized unpaved construction roads and 10 miles per hour on unpaved areas within rail line construction sites or unstabilized unpaved roads and further reduce speeds when dust emissions are visible.
- Post vehicle speed limit signs at rail line construction site entrances.
- Inspect and wash construction equipment vehicle tires as necessary so they are free of dirt before leaving rail line construction sites and entering paved roadways.
- Provide gravel ramps at least 20 feet in length at tire washing/cleaning stations and ensure construction vehicles exit rail line construction sites through treated roadways.
- Use sandbags or equivalent effective measures to prevent run-off to roadways from rail line construction areas adjacent to paved roadways.
- Sweep the first 500 feet of paved roads exiting rail line construction sites or construction staging areas as appropriate.

- Cover or treat soil storage piles and disturbed areas remaining inactive for longer than 10 days with appropriate dust suppressant compounds.
- Provide vehicles used to transport solid bulk material on public roadways and that have potential to cause visible emissions with covers or sufficiently wet and load materials onto the trucks to a maximum level of at least one foot below the top of the truck bed sides.
- Use wind erosion control techniques where soils are disturbed in rail line construction areas, access and maintenance routes, and materials stock pile areas until the soil is stabilized or permanently covered with vegetation.

MM-7. In order to minimize fugitive dust emissions after rail line construction activities are completed, the Petitioner shall stabilize disturbed soils with a non-toxic soil stabilizer, soil weighting agent, or other approved soil stabilizing method.

MM-8. In order to limit air emissions from rail line construction equipment, the Petitioner shall schedule rail line construction in a manner to minimize rail line construction-related vehicle trips as feasible and shall limit the idling of heavy construction equipment to less than five minutes.

MM-9. In order to limit air emissions from rail line construction equipment, the Petitioner shall develop a construction traffic and parking management plan that maintains traffic flow.

Biological Resources – Vegetation, Wildlife, and Threatened and Endangered Species

MM-10. The Petitioner shall develop and implement a detailed hazardous waste and spill prevention plan to prevent spills of oil or other petroleum products during rail line construction, operation, and maintenance. The plan shall include specific preventative and first response procedures to address the release of hazardous materials, reporting and notification procedures, fuel storage and transfer practices to prevent spills and leaks.

MM-11. The Petitioner shall clear vegetation in preparation for rail line construction before or after the bird nesting season (March 1 to August 31) to avoid inadvertent removal of active nests (nesting adults, young birds, or eggs) and to ensure compliance with the Migratory Bird Treaty Act. If vegetation clearing for the rail line construction is required during bird nesting season, the Petitioner shall consult with the U.S. Fish and Wildlife Service regarding the implementation of appropriate nest survey methods to ensure that no migratory bird nests, eggs, or young are disturbed by construction activities until the eggs have hatched and the young have fledged.

MM-12. To address the concerns of the Texas Parks and Wildlife Department (TPWD), the Petitioner shall conduct ground-disturbing activities related to rail line construction before or after the Texas horned lizard hibernation season (September/October to March/April – when ambient temperatures fall below 75° F) to avoid destruction of hibernating Texas horned lizards. If ground-disturbing activities for the rail line construction are required during the hibernation season of the Texas horned lizard, the Petitioner shall consult with TPWD regarding the

implementation of appropriate preconstruction surveys to determine the presence of Texas horned lizards. If Texas horned lizards are present, the Petitioner shall contact TPWD to develop plans for their relocation.

Cultural Resources

MM-13. Should any rail line construction activities take place adjacent to but outside the rail line right-of-way in the vicinity of the three historic/prehistoric sites recorded during OEA's pedestrian archeological resources survey, Petitioner shall, prior to conducting those construction activities, consult with OEA and the Texas State Historic Preservation Officer (SHPO) regarding additional archeological investigations that may be necessary and report the results of any consultation with the SHPO to OEA.

MM-14. In the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during rail line construction, the Petitioner shall immediately cease all work and notify OEA and the Texas State Historic Preservation Officer (SHPO) pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO, the Petitioner, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.